

THIRD DIVISION
FEBRUARY 11, 2014

No. 1-11-2190

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23 (e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
)	
v.	)	Nos. 88 CR 6841
	)	88 CR 6842
	)	88 CR 6845
	)	88 CR 6846
)	
VINCENT BOGGAN,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

ORDER

- ¶ 1 *Held:* The judgment of the circuit court was affirmed over defendant's contention that his three-year term of mandatory supervised release was improperly imposed.
- ¶ 2 Defendant Vincent Boggan appeals the circuit court's order denying him leave to file a

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successive petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). On appeal, defendant contends, for the first time, that the three-year term of mandatory supervised release (MSR) that attached to his sentence is void and must be vacated because the Illinois Department of Corrections (IDOC) imposed it instead of the circuit court. We affirm.

¶ 3 Following four separate jury trials in 1988 and 1989, defendant was convicted of four counts of armed robbery and sentenced to consecutive prison terms of 30 (88 CR 6846), 30 (88 CR 6845), and 15 (88 CR 6842) years, and a concurrent extended prison term of 60 years (88 CR 6841). The trial court never mentioned MSR in sentencing defendant, and none of the sentencing orders reflect an MSR term. We affirmed the trial court's judgments on direct appeal. *People v. Boggan*, Nos. 1-89-0029 (1991) and 1-89-1165 (1991) (unpublished orders under Supreme Court Rule 23). Defendant repeatedly and unsuccessfully sought collateral relief, and we affirmed the dispositions. *People v. Boggan*, Nos. 2011 IL App (1st) 092327-U; 1-06-1934 (2009); 1-04-3127 (2006); 1-03-2527 (2004); 1-01-3780 (2002); 1-98-2631 (2000); 1-95-4176 (1997); 1-94-2284, 1-94-2417 (cons.) (1995); 1-94-1715 (1994) (unpublished orders under Supreme Court Rule 23).

¶ 4 On January 15, 2011, defendant filed a motion seeking leave to file a successive post-conviction petition under the Act. In his motion, defendant alleged that the trial court erroneously found at sentencing that he lacked rehabilitative potential when it stated that he "needs to be incapacitated for the rest of his adult life." Defendant also asserted that the trial court violated the cruel and unusual punishment and due process clauses of the United States

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Constitution. On March 31, 2011, circuit court denied defendant leave to file his successive petition, and further denied his motion to reconsider that judgment on June 16, 2011. This appeal follows.

¶ 5 On appeal, defendant has abandoned the claim in his petition and instead contends that the three-year period of MSR that attached to his sentence was never mentioned by the trial court and was not reflected in the sentencing orders. Therefore, according to defendant, the MSR term is void and must be vacated because it was imposed by the IDOC, not the trial court. The State responds that defendant waived his claim by not including it in his successive postconviction petition, and that his MSR term is not void.

¶ 6 It is well established that a defendant cannot raise a new issue or advance a new post-conviction allegation for the first time on appeal. *People v. Andrews*, 365 Ill. App 3d 696, 698 (2006), citing *People v. Jones*, 211 Ill. 2d 140, 148 (2004). Here, defendant's MSR claim is not properly before this court because it was not included in his successive post-conviction petition, which necessarily controls and confines the subject of this appeal. Therefore, defendant's attempt to insert this new claim on appeal is inappropriate.

¶ 7 Nevertheless, defendant attempts to circumvent waiver by arguing that his three-year MSR term is void. See *People v. Thompson*, 209 Ill. 2d 19, 25 (2004) (an attack on a void judgment may be made at any time). Whether a sentence, or portion thereof, is void is a question of law subject to *de novo* review. *People v. Donelson*, 2011 IL App (1st) 092594, ¶ 7.

¶ 8 Our recent supreme court decision in *People v. McChriston*, 2014 IL 115310, controls the issue of whether the MSR term imposed upon defendant's sentence was proper. In *McChriston*,

the defendant was convicted of unlawful delivery of a controlled substance, a Class 1 felony that carried a mandatory Class X sentence. The court sentenced the defendant to 25 years' imprisonment, but did not indicate that he would also be required to serve MSR pursuant to section 5-8-1(d) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-1(d) (West 2004)), nor did it mention MSR at the sentencing hearing. At the time the defendant was sentenced, the Code provided that "[e]xcept where a term of natural life is imposed, every sentence shall include as though written therein a term in addition to the term of imprisonment." *Id.* In 2011, section 5-8-1(d)(1) was amended and now reads, "the parole or mandatory supervised release term shall be written as part of the sentencing order." 730 ILCS 5/5-8-1(d) (West 2012). In distinguishing the language of the amended version of the statute, which the supreme court held required the trial court to explicitly write out the applicable MSR term into the order (*McChriston*, at ¶ 19), it found the plain language of the prior version provided that the sentence shall include a period of MSR as it it were written within the sentence (*McChriston*, at ¶ 17). Applying the plain meaning of the statute at the time the defendant was sentenced, the supreme court held that the sentencing order issued by the trial court included a term of MSR, even if the court failed to mention the MSR term at the sentencing hearing or in the sentencing order. *McChriston*, at ¶ 17. Thus, the defendant's term of MSR was automatically included as part of his sentence, and the IDOC did not add onto defendant's sentence when it enforced the MSR term. *McChriston*, at ¶ 23. In so finding, the supreme court overruled *People v. Kerns*, 2012 IL App (3d) 100375, ¶ 18, where the Third District considered similar facts and stated that "the DOC imposed a term of MSR under section 5-8-1(d)(4)." *McChriston*, at ¶ 23.

¶ 9 Here, defendant was convicted of armed robbery, which is a Class X felony that statutorily requires a three-year MSR term. Ill. Rev. Stat. 1989, ch. 38, ¶ 1005-8-1, now codified as 730 ILCS 5/5-8-1 (West 2012). The version of the statute applicable at the time of defendant's sentencing mirrored the statute applicable to the defendant in *McChriston* in that it also stated that "[e]xcept where a term of natural life is imposed, every sentence shall include as though written therein a term in addition to the term of imprisonment." Ill. Rev. Stat. 1989, ch. 38, ¶ 1005-8-1(d)(1). Following *McChriston*, we find that defendant's term of MSR was automatically included as part of his sentence even though the court did not mention the MSR term at the sentencing hearing or in the sentencing order, and that the IDOC did not impose the MSR term. Therefore, defendant's MSR term that attached to his sentence for armed robbery was not void as it was required by statute.

¶ 10 In reaching this conclusion, we note that our supreme court found *Earley v. Murray*, 451 F.3d 71 (2nd Cir. 2006) and *Hill v. Wampler*, 298 U.S. 460 (1936), relied on by defendant in support of his argument that his due process rights were violated where his MSR term increased his sentence beyond the trial court's order, unpersuasive. See *McChriston*, at ¶ 30, relying on *People v. Evans*, 2013 IL 113471, ¶ 15 (finding that *Early* had no authority in Illinois); *McChriston*, at ¶ 31 (stating that unlike the court in *Wampler*, where the trial court had the option to require the defendant to pay his fines before being released in prison, the trial court in *McChriston* had no discretionary power regarding the imposition of an MSR term). We likewise find *Earley* and *Wampler* distinguishable from the case at bar, as well as *United States ex. rel. Carroll v. Hathaway*, 2012 WL 171322 (N.D. Ill. Jan. 19, 2012), also relied on by defendant,

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where the district court's order finding the IDOC's imposition of an MSR term violated the defendant's due process rights was reversed upon reconsideration in *Carroll v. Hathaway*, 2012 WL 6758319 (N.D. Ill. Sept. 5, 2012).

¶ 11 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 12 Affirmed.